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No. 94-5707

In The
Supreme Court of the United States
October Term, 1994

SHARLENE WILSON,
Petitioner,

vs.

STATE OF ARKANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

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BRIEF
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IN SUPPORT OF THE RESPONDENT.

This Brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* one hundred times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The International Narcotic Enforcement Officers Association, Inc. (INEOA), is the largest organization of drug law enforcement officers in the world, consisting of more than 10,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among law enforcement officers. It is interested in the effective administration of justice and in protecting the safety and rights of law enforcement as well as respecting the rights guaranteed to all under the Constitution.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of executing and overseeing the process of search warrants within the bounds of the law, and (2) prosecutors and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained as a result of searches conducted pursuant to warrants.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

ARGUMENT

I.
THE FOURTH AMENDMENT DOES NOT ENCOMPASS A COMMON LAW RULE OF "KNOCK AND ANNOUNCE."

The common law rule as stated in the defendant's brief to the effect that a police officer must announce his office and purpose before entering premises to execute a search warrant, is derived from the ancient English decision in *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194 (K.B. 1603). Although the rule was followed in colonial America in the English writs of assistance statutes so despised by the colonists in the early 1770s, those statutory expressions of the rule constituted the English common law, not American common law. See Note, 80 Yale L.J. 139, 145 (1970).

The constitutional question, therefore, is simply whether the adoption of the Fourth Amendment in 1791, or by some other process, effected an incorporation of the common law rule. If it did, such incorporation would be evidenced in the reasonableness requirement of the Fourth Amendment, since there is obviously no specific reference to the rule in the language of the Amendment itself.

Indeed, it was not until 1813 in the case of *Bell v. Clapp*, 10 Johns R. 263 (N.Y. Sup. Ct. 1813), that an *American* court first made reference to the rule with respect to the execution of search warrants. Thereafter the common law rule was adopted by some courts in the United States, subject to some exceptions, both judicial and statutory. See Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 504-08 (1964), and 2 W. LAFAVE, SEARCH AND SEIZURE § 4.8, p. 271 (2d ed. 1987).

It is thus doubtful that the rule was a part of American common law at the time of the adoption of the Fourth Amendment and it is likewise doubtful that the Framers intended the English rule to be incorporated *sub silentio*.

Indeed this Court has had at least three opportunities to consider the question, but in none of the cases did it make the rule a constitutional requirement. *Ker v. California*, 374 U.S. 23 (1963); *Miller v. United States*, 357 U.S. 301 (1958); *Sabbath v. United States*, 391 U.S. 585 (1968). In the authority most ardently relied upon by the defendant in this case, i.e., *Ker*, only a minority of the Justices of this Court believed that the rule was required by the Fourth Amendment.

On the other hand, this Court has spoken decisively on the constitutional manner for execution of warrants, and when it has done so it has spoken in terms of flexibility and discretion left to the jurisdictions to adopt reasonable rules to protect vital interests. In *Ker*, for example, the majority stated that

> The States are not thereby precluded from developing workable rules governing arrest, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain . . .

374 U.S. 23 at 34.

In *Dalia v. United States*, 441 U.S. 238 (1979), a case dealing with the execution of an order for electronic surveillance (covert entry), this Court said:

> Nothing in the language of the Constitution or in this

Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above [probable cause, particular description of place to be searched, particular description of things to be seized], search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection "against unreasonable searches and seizures." * * *

It would extend the warrant clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers. Such an interpretation is unnecessary, as we have held —and the Government concedes—that the manner in which a warrant is executed is subject to later judicial review as to its reasonableness.

441 U.S. 238 at 257.

Flexibility and practicality—whether with or without common law considerations—has long been the approach of this Court in dealing with the practical problems of law enforcement that fall within the purview of the Fourth Amendment. Thus, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court recognized that police officers must have flexibility greater than that allowed by the Fourth Amendment probable cause requirement to deal with potentially dangerous confrontations with criminal suspects and adopted the reasonable suspicion standard. Additionally, in *New York v. Belton*, 453 U.S. 454 (1981), the Court adopted a bright line rule for the search of motor vehicles that comported with the practical exigencies that officers face in dealing with custodial arrests

of occupants of vehicles. And finally in *United States v. Leon*, 468 U.S. 897 (1984), this Court recognized the essentially practical basis for the Fourth Amendment exclusionary rule, i.e., deterrence, and ruled in favor of a Fourth Amendment jurisprudence bound not by technicalities but by the practical realities of the difficult and dangerous tasks of law enforcement officers in the real world of the Twentieth Century.

Many more examples could be given, but *amici* simply request that the Court—as it has in the past—give due deference to the practical realities of law enforcement, and not be bound in terms of a constitutional imperative by a case and the common law of another country, be it ever so important to our shared jurisprudence with England. Indeed, the glowing triumph of the common law has always been its ability to grow and adapt to the needs of changing times and not to make permanent rules for the sake of permanency itself. The needs of 1995 are not the needs of 1603 that were the basis for the *Semayne* decision of that year.

II.

THIS COURT SHOULD ADOPT A BRIGHT LINE RULE PERMITTING NO KNOCK SERVICE OF SEARCH WARRANTS UNDER CIRCUMSTANCES INVOLVING TERRORISM, DRUGS, AND OTHER SITUATIONS WHERE A REASONABLE SUSPICION OF ARMED CONFRONTATION EXISTS.

While many federal and state courts have held or simply assumed that the knock and announce rule is embodied in the Fourth Amendment, see, e.g., *Rivera v. United States*, 928 F.2d 592 (2d Cir. 1991); *United States v. Mueller*, 902 F.2d 336 (5th Cir. 1990); *People v. Gonzalez*, 211 Cal. App. 3d 1043 (1989); *State v. Valentine*, 264 Or. 54 (1972), some jurisdictions have disagreed, see, e.g., *Commonwealth v.*

Goggin, 412 Mass. 200 (1992); *People v. Saechao*, 129 Ill. 2d 522 (1989), and have taken the position that it is not constitutionally required.

Whether holding or assuming a constitutional requirement —or not—many states have also adopted statutes permitting no knock entries for the service of search warrants and the use of force to take into consideration the dangers faced by law enforcement officers in this type of activity. Typical among them is the Illinois Code of Criminal Procedure (725 ILCS § 5/108-8):

> Use of Force in Execution of Search Warrant.
>
> (a) All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant.
>
> (b) Upon a finding by the judge issuing the warrant that any of the following exigent circumstances exist, the judge may order the person executing the warrant make entry without first knocking and announcing his office:
>
> (1) the presence of firearms or explosives in the building in an area where they are accessible to any occupant;
>
> (2) the prior possession of firearms by an occupant of the building within a reasonable period of time;
>
> (3) the presence of surveillance equipment, such as video cameras, or alarm systems, inside or outside of the building;
>
> (4) the presence of steel doors, wooden planking, crossbars, dogs, or other similar means of preventing or impeding entry into the building.

Statutes such as this—and also many rules and policies of law enforcement agencies within *amici's* constituency—simply recognize the paramount importance of officer safety in cases involving terrorism (where weapons are virtually

always present) and drugs (where in today's illegal marketplace, much the same can be said).

Indeed there is good reason for this, a reality that even the defendant concedes in her petition for review in this case. At page 12 of the Petition for Writ of Certiorari to the Arkansas Supreme Court, defendant states that ". . . there are hundreds of millions of firearms in American homes . . ."—a fact clearly recognized by every school child, parent, employer, and virtually every other person in America.

No one today knows this bit of Twentieth Century Americana better than state and federal law enforcement officers. In just 10 years, from 1982 to 1992 (the last year for which statistics are available), the number of assaults with a firearm upon law enforcement officers resulting in a personal injury to the officer almost doubled—from 2,642 in 1982 to 4,455 in 1992. For all types of weapons used in assaults upon officers resulting in personal injury to the officer, the figures rose from 55,775 in 1982 to 81,252 in 1992. See Bur. Justice Stat. Sourcebook of Crim. Jus. Stat. 1993, Table 3.163. *Amicus* International Narcotic Enforcement Officers Association, Inc., in particular has collected many examples of officers injured and killed during the execution of search warrants and annually awards commendations and honors to those officers for their bravery.[1]

These are the practical realities that defendant overlooks in the discussion of constitutional issues. Those issues are of

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[1] *Amici* note that there often is uncertainty in drug raids. One or more armed and dangerous persons, who are not residents, might be on the premises at the time a search warrant is served. This could include the suspect's supplier of drugs.

great interest to constitutional scholars, and indeed to all of us, but take on a different cast when law enforcement officers face the reality of the potential for meeting weapons head on almost every time they execute a search warrant on certain types of premises, whether it be a terrorism case or one involving a misdemeanor possession of drugs.

Another reality they face is that when the warrant is for drugs, the contraband is almost always in an easily destructible format and is likely to be on its way down a toilet or sink bowl before an officer can get through the door after having announced his presence and purpose. The entire industry of illegal drugs in America today is geared to two principles—the destructibility of evidence when apprehension approaches and the need to use force to prevent apprehension.

This Court has not hesitated in the past to design bright line rules for law enforcement related to safety and the destruction of evidence. See, *Terry* and *Belton*, *supra*. Nor has it ignored the reality that in the final analysis the Fourth Amendment must not merely protect abstract rights and principles, but must also observe and serve actual human behavior, i.e., deterrence. See, *Leon*, *supra*.

***Amici*, therefore, respectfully request this Court to resolve the constitutional issue in a manner preserving a bright line rule for federal and state law enforcement officers to the effect that when properly issued search warrants for premises (as was true in this instance) are executed in cases involving terrorism, drugs, or in other circumstances where officers possess reasonable suspicion that subjects within the premises may be armed and dangerous—or simply possess weapons—their unannounced entry of the premises to execute the warrant comports with the Reasonableness Clause of the Fourth**

Amendment.[2]

Such a rule would encourage the states to continue the process of statutory regulation of the execution of search warrants—a proper legislative concern—and law enforcement agencies and prosecutors to continue the process of administrative regulation of the subject—through policies, rules, protocols, and discipline of officers who abuse their discretion.

For persons who are aggrieved by the conduct of an officer in a particular case, the presence of an adequate civil remedy such as 42 U.S.C. § 1983 (as made accessible to any plaintiff with a case having merit—in effect through the ability to have counsel fees and costs established for the "prevailing" party through 42 U.S.C. § 1988), and the tort law of every state, would continue to serve as an effective means for both redress and deterrence, in lieu of suppression of evidence.

Amici submit that such a bright line rule is both reasonable, as measured by the Fourth Amendment, and necessary, as measured by the increasing dangers that officers face in executing search warrants. Such a rule would constitute the appropriate balance that this Court seeks to achieve between the personal rights of freedom for our citizens and the necessity of government to protect itself and its law enforcement officers. Based upon our experience as law enforcement officers, administrators, prosecutors, and legal

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[2] This would assume, of course, that the officers did not use force incommensurate with the totality of the circumstances known to them. *Graham v. Connor*, 490 U.S. 386 (1989) (adopting the Fourth Amendment objective reasonableness standard for seizures not involving the use of deadly force).

advisors, we assure this Court that such a rule is necessary to protect the lives of law enforcement officers and preserve evidence. It is as necessary as were the bright line rules fashioned by this Court in *Terry v. Ohio* and *New York v. Belton*.

CONCLUSION

Amici urge this Court to affirm the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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